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FISHERIES REGULATIONS UNDER EXTENDED JURISDICTION AND INTERNATIONAL LAW



FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

**FISHERIES REGULATIONS UNDER EXTENDED
JURISDICTION AND INTERNATIONAL LAW**

by

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
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ABSTRACT

This paper discusses two of the problems associated with the changes taking place in the international law of the sea. The first of these deals with the transit of fishing vessels through zones of national jurisdiction beyond the territorial sea. Transiting fishing vessels have an interest in expeditious transit and the coastal States have an interest in ensuring that the vessel is not fishing within its zone during transit passage. This conflict of interest is examined and various alternatives for resolving the conflict are appraised in terms of the international law of the sea. The second problem is that of the regulation of fishing for highly migratory species in high seas enclaves beyond national jurisdiction. The interests of fishing and coastal States are examined in the light of developments in customary and conventional international law. Although the problems discussed are of primary interest to the South Pacific States, they are also relevant to other regions of the world.

CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. TRANSIT OF FISHING VESSELS THROUGH ZONES OF NATIONAL JURISDICTION BEYOND THE TERRITORIAL SEA	1
A. Conflicting interests at stake	1
B. Alternatives for protecting coastal interests	2
C. Applicable international law	5
D. Appraisal of alternatives in terms of the international law of the sea	7
(1) Apply territorial sea law to passing fishing vessels	7
(2) Prohibition of entry by unlicensed fishing vessels	9
(3) Required sealanes	9
(4) Reporting of entry into zone	12
(5) Stowage of fishing gear during passage	13
(6) Require transitting FVS to carry transponders to facilitate location and identification	14
(7) Measures employed pursuant to international agreement	14
E. Concluding remarks	14
III. REGULATION OF FISHING FOR HIGHLY MIGRATORY SPECIES (HMS) IN HIGH SEAS ENCLAVES BEYOND NATIONAL JURISDICTION	15
A. Customary international law of fisheries	16
B. High seas enclaves and the draft Convention on the Law of the Sea	18
C. Concluding remarks	21
IV. BIBLIOGRAPHY	22

I. INTRODUCTION

This report examines two international law of the sea issues that arise in connection with extended national jurisdiction over fisheries: (1) fishing vessel transit of an economic or fishery zone, and (2) treatment of fishing for highly migratory species (HMS hereafter) within the so-called mini-high seas, the enclosed or semi-enclosed pockets beyond national jurisdiction that are found, for example, in the west central and southwestern Pacific Ocean.

The following discussion, first, describes the problem of fishing vessel transit in terms of the conflicting interests; second, identifies several alternatives for dealing with transitting fishery vessels; third, examines contrasting views of the draft LOS convention pertinent to this problem; fourth, appraises the alternatives in light of customary international law and the draft LOS convention. The second part of the report considers the enclaves question.

II. TRANSIT OF FISHING VESSELS THROUGH ZONES OF NATIONAL JURISDICTION BEYOND THE TERRITORIAL SEA

A. Conflicting interests at stake

Widespread adoption of 200 n.mile exclusive economic or fisheries zones results in enclosing the great preponderance of marine living resources within the national jurisdiction and control of the coastal States of the world. ^{1/} These areas, however, continue to be used for traditional navigation by all types of vessels between parts of high seas and between Third State zones of jurisdiction and between these two. Coastal States exercising control over fisheries in the zone are naturally concerned that fishing vessels in their zones are merely passing through or are complying with applicable fishery regulations. Such a State has a significant interest in assuring itself that vessels in transit do not engage in illegal fishing or otherwise violate coastal State laws governing all fishing and fishing-related activities in the zone.

Flag States of fishing vessels in transit of a zone are, on the other hand, interested in efficient use of intervening zones for movement of their vessels to distant regions and thus wish to enjoy movement through fishery zones without consequential interference or impediment. Further, maritime States in general might be concerned about treatment accorded fishing vessels because they see potential difficulties for the other types of vessels using the zone if coastal States should seek other controls over navigation in the zone. ^{2/}

The interests of both coastal and flag States are legitimate. The question which arises is how the coastal State may protect its recognized interests in the fisheries of its zone without inviting opposition by maritime States most concerned about the principle of freedom of navigation.

The clash of interests is not academic. Fears of unauthorized fishing by passing vessels have bothered some of the Pacific Island nations through whose zones vessels from Korea, Japan, and Taiwan normally travel enroute to fishing grounds elsewhere. ^{3/} Off West Africa there is a potential similar problem as European vessels transit the region en route to South Africa, Namibia and Senegal. In the

^{1/} As of 1 May 1981, the US Department of State reported that 90 States claim 200 n.m. zones, of which 54 were economic zones, and 14 were territorial sea, leaving 32 extended fishing zones. The report notes also that "Boundary situations with neighbouring States prevent many States from extending their fishing zones to a full 200 nautical miles".

^{2/} For early recognition and caution about this development, see Bilder (1974).

^{3/} Ambassador Djalal reported this concern regarding vessels transitting Indonesian waters. See Djalal (1980).

eastern Indian Ocean difficulties might arise from vessels moving from the south to the Bay of Bengal. ^{4/} It is even conceivable that fishing nations might secure fishing permits from a particularly convenient ^{5/} nation and attribute catches to that State's zone which were in fact caught in another State's while supposedly in transit. It is not known whether such "licences of convenience" have been secured or used in this way.

B. Alternatives for protecting coastal interests

A number of measures have either been adopted or proposed for protecting coastal interests in safeguarding its fisheries from vessels in passage or ostensibly so. They vary, as discussed below, in terms of compatibility with international law and of probable acceptability. The following discussion refers also to pertinent legislation and national practice, if any. Alternative measures include the following:

- (1) Subject fishing vessels in transit through the fisheries zone to the same treatment as applied in the territorial sea. ^{6/}

Insofar as actual fishing by such vessels is concerned, this alternative is already uniformly recognized, i.e., coastal States may act to prohibit unauthorized foreign fishing in the fisheries zone in a fashion not significantly different than in the territorial sea. This proposed approach would add, however, some new elements:

- (a) Compliance with the same laws as are imposed on fishing vessels in passage through the territorial sea. ^{7/} Failure to comply with such laws would entail loss of the protection of innocent passage, thus entitling the coastal State to take the measures necessary to prevent passage. The coastal State might, on the other hand, seek to impose the more severe sanctions of arrest, fine, and confiscation of boat, gear, or catch, or all of these. Perhaps the most significant single coastal law in this connection would be that requiring that gear be stowed so that it is not readily available. ^{8/}
- (b) Passage of fishing vessels, as a class, might be suspended on the ground that infringements of coastal fishing laws are a threat to the security of that State. ^{9/} Support for this action would presumably be cast in terms of the impact upon the coastal State's economic health and fiscal standing resulting from large-scale illegal fishing in the zone.
- (c) Movement through the zone must be continuous and expeditious, meaning that no stopping is permitted except as incidental to ordinary navigation or required by force majeure or distress or for rendering assistance. Such a requirement would seem to imply also that the navigation route be direct and detours avoided subject to the conditions just noted.

^{4/} The areas mentioned in the text are cited for illustration only. The Caribbean and the western side of South, Central and North America might also be cited.

^{5/} Convenience here might include, for example, much lower fees than other regional States are imposing for the same or comparable species.

^{6/} This situation already pertains for the 14 States that now claim a 200 mile territorial sea.

^{7/} Although the Maldives requires consent for entry of fishing vessels into its EEZ, its law applies innocent passage standards to movement through the EEZ. (Law No. 32/76 of 5 December 1976, Article 1.) The consent requirement is inconsistent with the concept of innocent passage.

^{8/} The reference is to significance amongst all coastal State laws. Later discussion considers the alternative of extending only the stowage law to the economic or fisheries zone and concludes that this would be permissible under international law.

^{9/} Both the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1981 draft LOS Convention permit temporary suspension of passage under certain conditions. It is very doubtful that the action identified in the text would be compatible with provisions in either document.

- (d) Another possibility in this connection might be a coastal demand that fishing vessels in the EEZ or EFZ comply with all coastal laws applicable in the territorial seas. This might include regulations for navigation and traffic safety, pollution, security (including closed areas, prohibitions on radio traffic, special reporting procedures), and customs procedures (including reporting on movements).

So far as is known, no State has sought to extend all of its territorial sea laws to fishing vessels in its jurisdictional zone beyond. Some do have a provision in their EEZ law which would authorize such action. ^{10/} As noted below, however, some specific components of the territorial sea regime are being extended to the jurisdictional zone, including, of course, the most significant one, the prohibition of foreign fishing.

- (2) Any access by a fishing vessel to the fisheries zone is prohibited unless it is specifically authorized.

Only two States appear to have laws that go this far. One of these (Yemen Arab Republic) is ambiguous and, in any case, its prohibition excepts such entry "as may be permissible under international law or Convention or treaty." ^{11/} The Maldives, however, is quite explicit in forbidding any entry by fishing vessels even for passage. ^{12/}

- (3) Fishing vessels in transit must employ designated sealanes which the coastal State monitors and polices.

While no State appears presently to require use of a designated sealane for fishing vessels in the EEZ or EFZ, some have provisions in their EEZ laws which would allow such a requirement. India's law on the EEZ provides for the declaration of a designated area in the zone within which necessary provisions may be made for exploration, exploitation and protection of resources. An "Explanation" following this section states:

A notification issued under this subsection may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India. ^{13/}

^{10/} See, for example, the economic zone laws of India, Pakistan, Seychelles, Barbados and Guyana. Article 7(7) of the Indian law appears to be the prototype. It reads: "The Central Government may, by notification in the Official Gazette (a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof, to the exclusive economic zone or any part thereof; and (b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India."

It seems likely that the aim of this law is different than its apparent broad effect. Whatever the idea was, the terms seem broad enough to authorize extension of the corpus of territorial sea law to the EEZ.

^{11/} Article 2, Fisheries Law 1976. I am indebted to Mr. R. Khan of FAO for information about this law. This law does not appear in the U.N. Legislative Series.

^{12/} Law No. 32/76 of 5 December 1976 provides that innocent passage applies to the economic zone but at the same time, and inconsistently, it prohibits entry by any fishing vessel unless consent to do so is secured. Apparently enforcement of the prohibition is mostly unsuccessful, but vessels have been seized when disabled or grounded. Even if the entry prohibition were rescinded the Maldives would still be out of step with everyone else because of its innocent passage requirement.

^{13/} Article 7(6). Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

Other States with such provisions include the Seychelles, Pakistan and Guyana, each of which makes this a regular section of the statute rather than an "explanation". 14/

It is worth notice, also, that Australian law could have the effect of imposing a mandatory sealane. Article 13AB of the Fisheries Act provides that a "person shall not, in the declared fishing zone, have in his possession or in his charge a foreign boat equipped with nets ..." for catching fish. A boat in transit would fall within this proscription except for a subsequent paragraph that it is a defence if the person charged satisfies the court that "(b) the boat was travelling through the Australian fishing zone --

... (iii) from a point outside the Australian fishing zone to another point outside the Australian fishing zone by the shortest practicable route;" 15/ (emphasis added)

Presumably there is one route which is shortest between two points at any given time and it would be up to the vessel captain on being apprehended on another route to persuade a court that the latter was the shortest practicable. This approach, of course, burdens the fishing vessel substantially because it is liable to be arrested and then have to prove its bona fides as a transitting vessel. This is wholly inconsistent with freedom of navigation. In addition compliance with the Act forces the vessel to use, where practicable, a specific route through Australian waters. Final judgment as to what is practicable is not for the officer in charge of the vessel but for a court with no firsthand knowledge of the sea or of this incident.

(4) Fishing vessels in transit must report entry and exit by time and place. 16/

On entry, fish aboard must be reported or, if stopped in the zone, it will be presumed that any fish aboard were caught in the zone.

14/ Spain's law on the economic zone is broad enough to require foreign vessels to comply with a variety of laws to protect against unlawful fishing. Article 5 provides that "In the exercise of the freedom of navigation foreign fishing vessels must comply with Spanish laws designed to prevent such vessels from fishing in the economic zone, including the laws concerning the carrying of fishing tackle." It is not clear what sanction, if any, applies for non-compliance.

In addition Pakistan's Exclusive Fishing Zone (Regulation of Fishing) Act, 1975 provides in Section 4 that "Every fishing craft shall be subject to any law relating to navigation for the time being in force."

15/ Article 15(d) of Fisheries Amendment Act 1978.

16/ So far as can be discovered no State requires a vessel in transit to notify the coastal State of its entry and passage. But several States' laws are broad enough to include such a reporting requirement including those of India, Seychelles, Pakistan, Barbados and Guyana mentioned (see footnote no. 10 on page 3).

However, Canada's Coastal Fisheries Protection Regulations in effect require reporting of entry if Canadian officials request the report. Section 15(2) provides that a foreign fishing vessel enroute through Canadian fisheries waters "is subject to the following conditions while in Canadian waters:

...
(c) Where a protection officer or Regional Director-General requests information respecting the name, flag State, location, route or destination of the vessel, or the circumstances under which it entered Canadian fisheries waters, the master of the vessel shall promptly convey the information to that officer or Regional Director-General."

If the vessel in transit had originally entered in distress or to render assistance the vessel is required to initiate a report of the circumstances of entry and the name, flag State, location, route and destination of the vessel (Article 14).

- (5) Fishing vessels in transit must have gear stowed and secured so that it is not readily available for fishing. 17/
- (6) Require transitting fishing vessels to carry transponders to facilitate location and identification. 18/
- (7) Implement protective measures by international agreement.

C. Applicable international law

International law pertinent to the acceptability by States of the alternative measures outlined above includes customary and potential conventional law. Customary law requires consideration because the prior law of the sea treaties concluded at Geneva in 1958 are now mostly superseded by developments in State practice. The near universal adoption of 200 mile exclusive zones for fishing has modified understandings embodied in the 1958 Convention on the High Seas. This new customary law is discussed below in relation to each of the alternatives that might be employed to deal with fishing vessels in transit of a zone.

It now seems likely that the 3rd UN Conference on the Law of the Sea will conclude in the foreseeable future with approval of a draft LOS Convention. The 1981 draft almost certainly contains the relevant substantive provisions that bear on the immediate problem and that will appear in the treaty ultimately signed. At some stage in the future the LOS agreement will provide the standards States will apply in assessing the acceptability of coastal measures affecting navigation of fishing vessels in the economic zone. Current views about interpretation of pertinent provisions of this treaty are therefore of special interest. Such views are examined now because they bear on appraisal of all the alternatives; the subsequent section examines each alternative more specifically in light of applicable customary law and the draft LOS convention. Such views are pertinent at this point also because they suggest some attitudes about freedom of navigation that explain expectations about customary law as well as conventional. These expectations bear on the probable reception of alternatives for dealing with transit of fishing vessels.

In relation to the LOS convention the basic problem regarding all proposals for regulation of passing fishing vessels is that of accommodating coastal State rights to fisheries with recognition of freedom of navigation in the EEZ. The Convention (Article 56) declares that, in the EEZ, the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters". In exercising these rights, the coastal State is obliged to have "due regard to the rights and duties of other States". The Convention spells out the coastal State's authority to promulgate laws and regulations for fishing in the EEZ (Article 62), but does not expressly provide for regulatory competence vis-a-vis fishing vessels in transit.

The Convention declares that other States have rights in the EEZ. Article 58 states that "In the exclusive economic zone, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight..."

17/ States with gear stowage requirements in the economic or fisheries zone include Australia (a defense to a charge of possessing or having in charge a foreign boat equipped to catch fish), New Zealand, Seychelles, Sierra Leone (territorial sea of 200 n.mi.), Solomon Islands, Spain, Canada, The Gambia, Maldives, and United Kingdom.

18/ Vessels authorized to fish in a zone are often required to carry transponders, but so far as is known this has not been extended to passing vessels.

The specific issue arising under these provisions is whether the coastal State may prescribe, and enforce upon passing vessels, measures to prevent unauthorized fishing. In terms of the convention the question is whether regulations affecting passing fishing vessels falls within the coastal State's sovereign rights to conserve and manage its EEZ fisheries. If such regulation is an exercise of its sovereign rights, then the coastal State, pursuant to Article 73, may take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the coastal State's laws and regulations. Further, the right to freedom of navigation spelled out in Article 58 is expressly stated to be "subject to the relevant provisions of this Convention" amongst which are those providing for the sovereign rights of the coastal State.

Views differ regarding coastal State competence to adopt measures affecting navigation by fishing vessels in transit through the zone. One view is that the freedom of navigation mentioned in Article 58 is identical to high seas freedom of navigation in traditional law. In an article emphasizing the importance to the United States of freedom of movement in the LOS context, Ambassador Elliot Richardson of the United States commented on the key language of Article 58:

In the group which negotiated this language it was understood that the freedoms in question, both within and beyond 200 miles, must be qualitatively and quantitatively the same as the traditional high seas freedoms recognized by international law: they must be qualitatively the same in the sense that the nature and extent of the right is the same as traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete -- and allow for future uses no less inclusive -- than traditional high-seas freedoms (emphasis in original). 19/

Although this passage does not explicitly rule out coastal State regulations of passing vessels that are carefully designed and limited to protect coastal State resources from illegal fishing, it reasonably bears this interpretation. Under traditional international law, a coastal State could not extend its regulations to fishing vessels in passage beyond its territorial sea and any effort to enforce compliance with its regulations would have been regarded as inconsistent with the high seas freedom of navigation. 20/ A later passage in the same article notes that "under the text the United States would have the right to bring suit against a State that interferes with navigation or overflight". 21/

In another commentary offering detailed examination of the problem of accommodating coastal State resource rights with third State rights in the EEZ, Professor Bernard Oxman appears also expressly to reject any coastal State regulatory competence over passing fishing vessels. He writes:

In a strict juridical sense, the economic zone elaborated in the RSNT should be regarded as an overlay on the high seas. It generally eliminates freedom of fishing and to a certain degree some other freedoms (e.g., with respect to some scientific research and installations) and establishes a measure of concurrent rights or jurisdiction with respect to others (e.g., some scientific research and some vessel-source pollution), but it does not eliminate the traditional role of the flag state.

The clearest example of this is in the articles on vessel-source pollution. The rights of the coastal state do not displace the rights and duties of the flag state to control pollution from its vessels, but rather supplement them. However, other examples are worth noting as well. The sovereign rights of the coastal state with respect to fishing do not deprive a fishing vessel of freedom of

19/ See Richardson (1980).

20/ See Bilder (1974); at 150-52. However, Bilder also points out that both the 1958 Shelf Convention and the 1958 Fishing and Conservation of the Living Resources of the Sea Convention implicitly qualified the principle of non-interference that is the corollary to freedom of navigation. Id. at 152.

21/ See Richardson (1980); at 916.

navigation; nor do they deprive the flag state of its jurisdiction over that vessel, for example in the event of a collision, or even its right to punish the master and crew for violating coastal state fishing laws independent of any coastal state action. The existence of separate jurisdiction over the same vessel in the same area depending on its activities may require some nice accommodations in practice, depending on the facts. Absent specific evidence it would be manifestly unjustifiable to stop and board a freighter or oil tanker navigating through the zone to ensure that it is not fishing, but it would also be manifestly imprudent to expect the coastal state to refrain from inquiry regarding a large fishing fleet moving slowly with gear in readiness and with no apparent destination through a rich fishing ground far from any known navigation route. 22/

The suggestion appears to be in the example last given that all the coastal State could do to protect itself is to make inquiry by stopping and boarding the vessels involved in the "large fishing fleet". Other measures would be prohibited even if reasonable in regard to coastal and flag interests.

A very different view of the balance in the LOS Convention is that the rights of freedom of navigation and overflight are "subject to the relevant provisions of the present Convention" and that, therefore, these rights are subordinate to the coastal competences in the EEZ. In this interpretation of the Convention the very use of the term "sovereign rights implies that, in case of doubt, there will be a presumption in favour of the plenary powers and jurisdiction of the coastal State". 23/ "It must be said that the balance of principles is weighed heavily in favour of the coastal states. It is a question of sovereign rights exercised with due regard to the rights of other States on the one hand; and, on the other hand, of freedoms of navigation, overflight, etc., being enjoyed 'subject to the relevant provisions of the present Convention', ... having due regard to the rights of the coastal State and in compliance with the laws and regulations of the coastal state." 24/ This approach to interpretation places greatest weight on coastal interests and would resolve disputes in favour of the coastal State.

These two contrasting interpretations of the draft LOS Convention do not exhaust the possibilities, but they do suggest that very different views may prevail on the issue presented. Another view, reflected in later discussion of specific alternatives, is that freedom of navigation does not wholly insulate fishing vessels in transit from compliance with coastal measures designed to enforce its prohibition of illegal fishing provided that such measures are essential to effective enforcement, do not significantly affect passage, and benefit the coastal State in significant degree. Modest requirements that might occasion slightly longer voyages, or require specific measures aboard a fishing vessel, are consistent with the draft LOS convention.

D. Appraisal of alternatives in terms of the international law of the sea

(1) Apply territorial sea law to passing fishing vessels.

Only a low probability of general acceptance can be attached to proposals that fishing vessels in transit through a fishery zone be treated as if they were in a territorial sea. This alternative would,

22/ See Oxman (1977). For many years Professor Oxman has been one of the principal LOS negotiators for the United States and he continues to be.

In a recent article I expressed agreement with Oxman's statement that the Convention establishes the "qualitative identity" of economic zone and high seas freedoms. Burke, National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea, 9 ODILJ 289, 303 (1981). As noted below, this identity can be accepted without entirely rejecting coastal authority to protect fisheries by measures which affect navigation.

23/ See Brown (1977). The exclusive economic zone: criteria and machinery for the resolution of international conflicts between different users of the EEZ, 4 Marit. Pol. Mgmt. 325, 334 (1977).

24/ Ibid.

therefore, seem particularly inadvisable under either customary international law or the draft LOS treaty. A major reason for this conclusion is that such treatment would significantly blur the distinction between the territorial sea and the limited jurisdictional area beyond. Any suggestion that, for navigational purposes, the two areas are similar, or should become so, would raise serious questions relating to military and other commercial navigation in the extended zone of jurisdiction. In relation to a significantly large class of vessels, this alternative would substitute the territorial sea regime, including innocent passage, for the freedom of navigation that has historically prevailed in the ocean beyond national territory. Even though limited to fishing vessels, the change in regime to that extent would make the zone of extended jurisdiction more closely resemble a 200 mile territorial sea. It is worth recalling and emphasizing that the extension of national jurisdiction for resource purposes to 200 n.miles has already extended certain sovereign rights usually associated with national territory to a very large region beyond. Adding an element affecting navigation of an important class of vessel would almost certainly cause great uneasiness amongst many flag States and be rejected by most of them.

Sensitivity towards this issue is heightened, not lessened, by the possible imminent conclusion of the United Nations Conference on the Law of the Sea. These negotiations were in important part originally stimulated by the fear of major maritime States over so-called "creeping jurisdiction", a shorthand label for apprehension about continued unilateral extensions of territorial sea limits. While the negotiations are not yet complete, this significant component of them now appears to be firmly settled through generally accepted provisions that establish a 12 mile territorial sea and an exclusive economic zone (EEZ) beyond to a 200 mile overall limit. A highly critical element of the agreed provisions concerns the regime for navigation in affected areas including the territorial sea itself, straits used for international navigation, archipelagic waters, and the EEZ. A major distinction was drawn between, on the one hand, the regime of innocent passage in the territorial sea and, on the other hand, those of transit passage in straits, archipelagic sealanes passage in archipelagic waters, and freedom of navigation and overflight in the EEZ. The distinction made between all these regimes for navigation were central to the acceptance of the jurisdictional limits established for the various areas and of the overall LOS Convention itself. 25/

If there were now to be noticeable movement, in the form of unilaterally adopted State legislation, toward eliminating a part of the distinctions arrived at through laborious and controversial negotiations, the results could be unfortunate. An immediate expected effect would be to generate controversy and conflict surrounding the immediate legislative action as States insist that freedom of navigation cannot be totally abolished for fishing vessels. 26/ Over the longer and perhaps more important term, another result might be to raise questions about the usefulness of adherence to the treaty itself. Although isolated actions proposing to eliminate freedom of navigation for fishing vessels in the economic zone should not, and probably would not, have severe consequences or occasion undue alarm, they still might constitute one non-trivial element in a complex calculus of factors affecting decisions about ratification of the treaty. If, instead of isolated actions, there appeared to be strong regional movements toward altering an element of the agreed balance between coastal State resource interests and flag State navigation interests incorporated in the LOS treaty, much more serious consequences might be expected to follow.

The probability that the problem of transitting fishing vessels is localized (even though the regions involved are vast expanses of ocean) makes it unlikely that there would be a general world-wide movement of this kind. Nonetheless any tendency that garners significant support in one or more ocean regions could provoke serious opposition. The contemporary economic zone legislation of India, Pakistan, the Seychelles, Barbados, and Guyana suggests that significant difficulties could arise.

25/ The Soviet Union and the United States were the most sensitive regarding these matters. The articles cited earlier by Richardson and Oxman document this for the United States. For similar views see also Clingan (1980). For several years Professor Clingan has been the US representative on Committee 11 of the LOS conference.

26/ There can be no realistic doubt about the sensitivity of major maritime States on this issue. For expressions of concern on the question see Clingan, id. at 92-3.

(2) Prohibition of entry by unlicensed fishing vessels

Prohibition of entry is in a sense more extreme than the first alternative examined because it exceeds even the authority recognized over foreign fishing vessels in the territorial sea. Introducing a requirement for authorization by a foreign fishing vessel to enter the territorial sea for the purpose of passage would universally be considered to exceed coastal State authority under customary international law. Nothing in the 1958 Convention on the Territorial Sea and Contiguous Zone provides any basis for such authority. The 1981 draft LOS Convention also would not authorize such action.^{27/} Indications of the lack of coastal State authority to prohibit innocent passage of foreign vessels may be seen in the continuing dissatisfaction on the part of many States over the fact that the draft LOS Convention withholds this authority in the case of military vessels. The draft LOS Convention appears mainly to reflect customary international law in providing that all vessels, without distinction, have a right of innocent passage in the territorial sea.

Because it is evident that fishing vessels cannot be required under either conventional or customary international law to request permission to cross a territorial sea, a proposal to institute such a requirement for the EEZ or fishing zone is without legal precedent even in areas considered part of national territory. Although there are undoubtedly different problems in enforcing fisheries regulations in the vast expanse of a 188 mile zone beyond a 12 mile territorial sea than in the latter alone, these differences do not appear substantial enough to warrant such a drastic change in the navigation regime.^{28/} Other available alternatives, less threatening to the general interest in unimpeded navigation, should be given priority consideration.

(3) Required sealanes

Calling for the use of sealanes by fishing vessels in transit through a fishing (economic) zone partially resembles the first alternative discussed above because it would extend to the zone a portion of coastal authority previously recognized only in the territorial sea.^{29/} Certainly, under the traditional law of the sea, the coastal State has authority to prescribe regulations for protection of its living resources in the territorial sea. The 1958 Convention on the Territorial Sea and Contiguous Zone made provision in Article 14(5) precisely for coastal authority for this purpose:

Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

Previous international consideration of this problem, in the 1930 Codification Conference, makes it evident that legislation for protecting fisheries was considered permissible under customary international law.^{30/}

^{27/} The provision (Article 25) for suspension of innocent passage if essential for protection of coastal security offers a thin basis for prohibiting fishing vessel passage in the territorial sea because it is aimed at protection of military security. Such a restricted authorization in a territorial sea of 12 miles adds to the perceived importance of freedom of navigation in the exclusive economic zone beyond.

^{28/} The hazards of excluding vessels from the EEZ have not gone unnoticed. See Warbick (1973) at 137, 146 "It is a short step from excluding fishing vessels to excluding all ships, even without any reformulation of the nature of the exclusive claim."

^{29/} The sealane concept originated as a means of promoting safety of navigation. See Anon. (1972) for discussion of previous experience and an appraisal of sealanes under international law.

^{30/} For discussion see McDougal and Burke (1962).

It seems eminently reasonable that international law should permit the entity with resource jurisdiction to take measures to protect those resources from illegal harvesting. Nonetheless, under provisions of the 1981 draft LOS Convention, there might be some question about use of sealanes for this purpose even in the territorial sea. Article 21 declares that the coastal State may adopt laws and regulations relating to innocent passage in respect of "the prevention of infringement of the fisheries laws and regulations of the coastal State". This same article also provides that coastal State laws and regulations may relate to the safety of navigation and the regulation of maritime traffic.

Although both of these provisions seem broad enough to allow the coastal State to prescribe for the use of sealanes by fishing vessels, a question is created by Article 22 which seems to limit such authority to where it is "necessary having regard to the safety of navigation". This combination of provisions might be interpreted to restrict the requirement for use of sealanes to safety considerations alone and to forbid their use for conservation or economic purposes in connection with fishing. 31/

If this restrictive interpretation were regarded as limiting coastal authority in its territorial sea, it would be extremely difficult to argue persuasively that the coastal State should have a broader authority regarding passing vessels in the fishing zone. On the other hand, even if the coastal State were considered to have the necessary authority in its territorial sea, it does not necessarily follow that the same or substantially similar authority must be or should be permitted in the fishing zone beyond.

For the future the two question of interest are whether the use of sealanes in the fisheries (economic) zone is compatible either with customary law or the draft LOS Convention. With respect to customary law there is currently little evidence that sealanes are coming into general use for this purpose. National legislation and regulations concerning fisheries shed little light on this subject other than possible negative inference that might be drawn from the relative absence of specific provisions on sealanes. 32/

The more important question regarding customary law is whether the acceptance already accorded the extension of exclusive fishery management authority to 200 n.miles carries with it acceptance of coastal authority to adopt protective measures that have some effect upon navigation in the area. It hardly seems radical to argue that the evolution of extended fishery jurisdiction should be accompanied by the authority necessary to protect the living resources subject to that jurisdiction. At the same time the established right to freedom of navigation must also be protected against undue interference.

Under customary law freedom of navigation has never been regarded as absolute even though its protection has been widely recognized as an important and vital interest of all States. The traditional means of reconciling coastal and flag State interests has employed the standard of reasonableness, balancing the interests at stake and judging the permissibility of restrictions in terms of that standard. Over the centuries and including the most recent times, limitations on freedom of navigation have been accepted as new exclusive interests have come to be recognized. A prime recent illustration, which occasions not even a raised eyebrow today, arose from the extension of coastal authority over the continental shelf. It was impossible to make adequate provision for shelf exploration and exploitation under coastal State control unless freedom of navigation admitted of some modification. Similarly the 1958 Fishing and Conservation Convention and the later modest extension of exclusive fishing rights required acceptance of some slight encroachment on absolute freedom of navigation.

31/ Assuming any other legal requirements were met, the only feasibly permissible use of special sealanes for fishing vessels would be in situations where no existing sealane or traffic separation scheme was in use. Under present treaty law, ocean-going vessels are required to comply with traffic schemes and flag States are obliged to make deviation a crime under national law. These traffic problems would be unlikely to arise in areas far removed from normal shipping routes. In no circumstances should a sealane be allowed where it is incompatible with established sealanes.

32/ Only a handful of States have national regulations bearing on this issue and they are not known to have adopted any specific requirement.

The problem with 200 mile fishery zones is thus simply a larger instance of the familiar difficulty of accommodating enlarged coastal State exclusive interests with general community interests. A reasonableness standard does not call for absolute freedom for navigation nor do coastal State sovereign rights require or justify negation of that freedom. In the circumstances coastal State protective measures affecting navigation could be considered reasonable where they are necessary for effective management and enforcement, hold unusual benefit for a particular coastal State or States, and impose modest or slight burdens on navigation. Such measures would not be directly aimed at regulating navigation as such, but designed to protect resources subject to coastal State jurisdiction. It is conceivable that in some circumstances, limited probably only to certain key geographic and other circumstances, a sealane for fishing vessels would be a permissible development when reasonableness is assessed in terms of the factors mentioned.

The question under the draft treaty is whether a sealanes requirement is compatible with Article 58 which declares that "in the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight ...". Can the coastal State, consistent with this provision, require passing fishing vessels to use designated sealanes? There are two points to notice immediately. One is that the freedom of navigation mentioned is that found in Article 87, which is interpreted by some to mean this freedom is the high seas freedom of navigation as traditionally understood, i.e., before exclusive fishing zones were widely accepted.^{33/} If this were all that is relevant, the question might be answered immediately -- no coastal State has authority to require vessels passing on the high seas to employ any specific route for such passage. If it were desirable to use the sealanes concept to strengthen coastal authority to protect its interests in living resources, it would be necessary to seek international agreement to that end.

The second point, however, is that Article 58 does not confer a pure or undiluted right to freedom of navigation in the zone. The enjoyment of this freedom is "subject to the relevant provisions of this Convention". The relevant provisions include the coastal State's "sovereign rights for the purpose of exploring and exploiting, conserving the managing" living resources. This broad grant of authority is elaborated upon in Article 61 and following to give the coastal State complete power to dispose of the fisheries in its zone, subject to certain general standards and to requirements to cooperate with adjoining States and other States fishing in the region. Articles 61 and 62, in particular, provide the coastal State with ample general authority to protect the living resources of its zone from unauthorized foreign fishing and list specific competences to regulate all fishing activities by foreign vessels. The question that is left open, or not explicitly answered by these provisions, is how far the coastal State may go in affecting passing vessels as distinct from those expected to fish in the zone.

It does not seem unreasonable that in some circumstances a coastal State should be allowed to reduce an onerous regulatory and enforcement burden by measures that affect passing vessels. The question is, how much of an effect is reasonable? Assuming some impact on passing vessels does not unduly compromise the right of freedom of navigation, what are factors relevant to determining reasonableness?

Important factors surely must be the size of the zone relative to land mass and the value of resources therein to the national economy. In some parts of the ocean the ratio of water to land area of the State is high and there are enormous obstacles to maintaining adequate monitoring and surveillance of fishing activities involving valuable resources. Designating sealanes for passing fishing vessels might in some such circumstances make the difference between effective and ineffective enforcement and this, in turn, could have a significant impact on coastal State revenues that are especially important to that State. Where the advantage to the coastal State is so high, the added burden on passing vessels might not be unreasonable. On the other hand, it is also in the large ocean areas that the freedom to select the exact route may have special importance because of the vast distances to be overcome and the hazards of long-distance transit. The skippers of fishing vessels may need to change course and normal navigation routes in order to avoid bad weather or to take advantage

^{33/} See Richardson (1980); Oxman (1977); Clingan (1980).

of new information regarding desirable fishing areas. Perhaps these conflicting considerations could be accommodated by contingent designations of required sealanes or by an approach that would allow for departure from a sealane under specified conditions. If the designation can be made flexible without eliminating its usefulness, there would be a stronger argument for the reasonableness of a sealane requirement.

On the other hand, where sealanes requirements add significant time or hazard to fishing vessels passage, the impact on freedom of navigation would be impermissible and flag States would have good reason to object.

On balance under the draft LOS treaty, the requirement of due regard by the coastal State for freedom of navigation imposes a heavy burden that can probably be discharged only in select and somewhat unusual circumstances. Restrictions on movement of any vessel should be limited to the exceptional situation. The main factors of importance in applying the "due regard" standard appear to be the coastal State's difficulty in securing adequate enforcement and the contribution that the fishery makes to the national economy. If the coastal State confronts unusual enforcement problems and the result is costly to a State that has significant dependence on revenues from fisheries, then the case for some modest interference with navigation would be persuasive.

A regulatory technique related to the use of sealanes for regulatory purposes is the use of "windows" or designated areas within which all or some fishing is prohibited as a means of protecting fishing grounds, vessels, or gear. Designated fishing areas or times are sometimes employed, and provisions also made for them in agreements with foreign fishing States, as a means of protecting the operations of slow-moving vessels or vulnerable fixed gear. All or some foreign fishing vessels and gear might be directed to avoid the designated areas or to use other routes through the region. As seems obvious, judicious location of these areas could operate to funnel fishing vessel traffic in a fashion similar to designated sealanes. While designated areas may be legitimate regulatory devices for certain protective purposes, and may have an incidental effect on passing vessels, they ought not be adopted unilaterally as a subterfuge to aid monitoring and surveillance efforts by coastal States.

(4) Reporting of entry into zone

This alternative would impose a relatively light burden on passing vessels, but a requirement for notification of entry into a fishing zone by a vessel intending only to pass through might disturb some States because it asserts an authority that the coastal State does not have in its territorial sea. A notification requirement in an economic or fishing zone might, therefore, raise serious questions for those States who wish to maintain the zone as much as possible like the high seas and therefore subject to even less coastal authority than the territorial sea.

Another perspective that merits consideration is the potential benefit to the fishing vessel of reporting its entry and its fish cargo. A reasonable premise is that the coastal State may stop, board, and inspect vessels in its jurisdictional zone in order to enforce its laws and regulations concerning fishing. Article 73(1) of the draft LOS Convention recognizes that enforcement measures are an exercise of the coastal State's sovereign rights over living resources in the economic zone and declares that the coastal State "may make such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention". This article probably reflects State practice and customary law. Accordingly, even a passing vessel might be stopped and boarded in connection with enforcement of local fishing laws. If the vessel has no permit to fish but has fish aboard, there is a reasonable basis for presuming that the vessel has violated coastal laws requiring a permit to harvest fish in the zone. The difficulty is, of course, that without further evidence establishing an offence it could be extremely difficult to prove that the fish aboard were actually caught in the zone and not outside. Two States (Bahamas and Seychelles) seek to deal with this situation by adopting a presumption that the fish aboard were caught in the zone unless the contrary is proved. Additionally, the Seychelles law permits the presumption to be rebutted by showing that the fishing vessel reported entry into the zone and

that it was intending to pass through. ^{34/} Under the Bahamian law the presumption is rebutted only by a showing that the fish were caught outside the zone.

A coastal State law requiring the report of entry may thus be seen as both assisting coastal State enforcement and removing a potential burden from the fishing vessel. A reporting requirement such as in the Seychelles law, which is not wholly voluntary, seems unexceptionable. The presumption that fish aboard were caught in the zone is reasonable and it also seems reasonable that a report on entry (including the quantity of fish aboard) will rebut it. If a vessel does not expect to have fish aboard because it intends merely to pass, there is no need to report. On the other hand, the vessel with fish aboard is hardly burdened by reporting such on entry.

Whether reporting entry in other circumstances will be regarded as reasonable seems doubtful, for the reason mentioned above that States are prone to be wary about coastal claims that go beyond their territorial sea authority. But in measuring reasonableness objectively, this measure seems acceptable. The effect on navigation of an entry report is virtually non-existent while the benefit to a hard-pressed coastal State could be substantial.

(5) Stowage of fishing gear during passage

Stowage requirements are a common provision in national legislation dealing with the territorial sea and also with the fishing zone. The widespread adoption of this measure and its obvious direct relationship to the protection desired make it a preferred approach. It would seem to be a minimal obligation, in principle, for a vessel intending only to pass. For these reasons the imposition of a gear stowage requirement as a condition of unimpeded passage is generally well within customary law applicable to fishing zones.

Nonetheless a stowage requirement presents the practical difficulties of being too onerous a burden for some fishing gear while for other gear it offers no protection against illegal fishing. The former situation is especially important because it involves tuna seine nets which are so bulky and heavy as to prevent stowage below deck and it is difficult otherwise to put such gear under constraint on easy availability. Accordingly an absolute storage requirement in such circumstances would be tantamount to forbidding passage completely and this is probably too severe to be regarded as permissible under international law. What appears to be needed is a practical technical solution that places the gear beyond easy availability.

On the other hand for pole-and-line fishing a stowage requirement is mostly irrelevant because such gear can be brought into play so easily even if it is stored below deck. ^{35/} By and large the stowage requirement originated as a means of coping with trawling gear and it requires ingenuity and

^{34/} United States fishery regulation of incidental catches also employs a rebuttable presumption. Section 611.13 of Title 50 of the Code of Federal Regulations states

It shall be a rebuttable presumption that any prohibited species or part thereof found on board a foreign fishing vessel was caught and retained in violation of this Part 611.

This section would presumably apply to fish caught outside the fishery zone and carried as cargo on a transitting vessel. Section 611.60(c)(3) provides for rebuttal if a vessel stores prohibited species caught outside the FCZ in a sealed hold which was inspected before the vessel commenced fishing in the FCZ. Section 611.60 is applicable only to vessels fishing subject to a GIFA and not to vessels in mere passage not subject to a GIFA. Presumably the U.S. would not seek to enforce 611.13 against passing vessels, despite the literal language of the latter.

^{35/} It has been used for halibut longline gear in the Gulf of Alaska where it was possible to place the gear under seal before it moved through areas closed for halibut fishing. See Koers (1970).

flexibility to make it an effective measure for other gear. Assuming that the necessary technical solutions can be discovered so that gear is made practically unavailable without imposing an impossible burden such that passage itself is not feasible, this requirement seems easily within international law either customary or conventional.

(6) Require transitting FVS to carry transponders to facilitate location and identification

This suggestion suffers from both practical and legal difficulties. The practical one, of course, is that the transponder can simply be left inoperative so that no response will be forthcoming to an electronic query. The second difficulty, more relevant here, arises because a requirement for carrying certain equipment aboard a vessel as a condition of transitting a fishing or economic zone could provoke a considerable outcry of protest. Flag States proved to be very sensitive to suggestions that coastal States could require equipment relating to vessel source pollution in the territorial sea and succeeded in eliminating any coastal State authority to this end except as the coastal prescriptions "are giving effect to generally accepted international rules or standards". The same approach was used to eliminate any independent coastal State authority in the EEZ. Article 211(5) limits coastal State measures for prevention, reduction and control of pollution from vessels to those "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference". The latter language successfully eliminates any independent coastal authority to regulate pollution-control equipment aboard passing vessels.

This sensitivity to protect navigation interests is reflected throughout Part XII of the draft LOS text and it manifests an attitude that might come to the surface quickly if coastal States sought to prescribe requirements for equipment aboard fishing vessels in transit. Accordingly the suggestion to require transponders for fishing vessels that intend only to transit is probably unacceptable to many States.

(7) Measures employed pursuant to international agreement

For some States, perhaps most or all States, the most effective and least costly means of dealing with fishing vessels in transit through a zone is to spell out acceptable and effective control measures in agreements with distant-water fishing nations. This approach might be particularly attractive to nations whose enforcement costs (monitoring, control and surveillance) are very high because of its small land mass in relation to the ocean region involved. In such circumstances the coastal State (or better, the coastal States of the region) may gain a great deal by avoiding the high costs of enforcement activities while the flag State assumes some of the costs of enforcing coastal State control measures. To achieve this by agreement would probably entail some form of recompense to the flag State, either a reduction in fishing fees or some other expected benefit. However, the pay-off required by the flag State may well be small relative to the very high costs of enforcement otherwise borne by the coastal State.

The advantages of the agreement approach include, of course, the removal of legal objections or obstacles to measures that might otherwise cause concern.

E. Concluding remarks

The problem of fishing vessel transit poses sharply a question about the major innovation of the LOS negotiations, the creation of the exclusive economic zone. The question is - how to accommodate the establishment of exclusive resource rights and jurisdiction with the continued maintenance of the freedom of navigation that is the most critical component of freedom of the seas. The stance taken here is that there must be an effort to reconcile coastal resource interests with navigation interests and that such an effort should recognize a very limited authority on the coastal State to affect navigation. Some effect must be considered permissible to the extent that coastal protective measures are necessary and particularly significant for a specific State. This is a long way from recognizing any general authority which all States might exercise. It seems doubtful that all States need such authority and to suggest such would or might lead to gratuitous difficulties not only for fishing but other vessels.

A major reason for being cautious about general conclusions concerning restraints upon freedom of navigation is that coastal State jurisdiction extends not only to resource activities but includes also scientific research and marine pollution. If a coastal State has an interest in protecting resources and can easily affect navigation to safeguard that interest, it is not much of a step to the institution of restraints upon mere passage of research vessels and to all the vessels that might conceivably harm resources by pollution.

A mechanism that deserves more attention than has been possible in this report is that of rebuttable presumptions based upon perceived facts that make the presumption a reasonable one. Some instances of such presumptions were noted in the discussion, but others might be explored for possible use. The major advantage of rebuttable presumptions is that they ease the burden of proof in a situation where evidence from surveillance is exceptionally difficult to obtain but at the same time they represent a minimal jurisdictional claim. Because the presumption can be rebutted the alleged violator of coastal laws has the opportunity of exculpation. The jurisdictional assertion is thus a contingent one but still may have a deterrent effect if vessels cannot successfully mount a rebuttal. At the same time a vessel to which the presumption could not be applied need not be concerned about potentially serious interference.

III. REGULATION OF FISHING FOR HIGHLY MIGRATORY SPECIES (HMS) IN HIGH SEAS ENCLAVES BEYOND NATIONAL JURISDICTION

In several places around the world, most significantly in the west central and southwest Pacific ocean, the adoption of 200 mile exclusive economic or fisheries zones results in the creation of wholly or partially enclosed enclaves of high seas. In this Pacific region the major commercial fish species is the tuna, which is labelled "highly migratory" because it moves for great distances from one ocean region to another, and which is accessible for harvesting within the exclusive zones of several States as well as in the enclaves beyond. This movement not only makes it impossible for any single State to manage the species properly but also for the combined States of the region to do so. Even if these States joined together to establish a common authority over their combined zones, it will not accomplish proper management when the same stocks are subject to uncontrolled harvesting in high seas enclaves beyond the combined zones. In the South Pacific the island States of the region have joined together to create a fishery management agency designed to facilitate cooperation, coordination and harmonization of their policies toward the living marine resources of the region (both within and beyond 200 mile zones), particularly the highly migratory species.

The combined 200 mile zones of these island nations are enormous but they still do not encompass significant high seas pockets within which HMS can be and are caught without regard to the conservation or other policies adopted by States in the region. The effects of an enclave harvest or unconfirmed reports of harvest are (1) to create or to suggest an unknown fishing mortality on HMS that are also caught within fishery zones, thereby making it difficult or impossible to determine how much mortality can be or ought to be permitted within the zones, and (2) to take fish without the necessity of paying for the right to do so, potentially depriving adjacent States of revenues that would accrue if the same fish were harvested within their zones subject to coastal State fees.

It is assumed for the purposes of this discussion that the adjacent States have two major interests: (1) to secure information on fishing mortality in the enclaves, and (2) to avoid revenue losses from fishing in that area.

The general question of coastal authority in an enclave may be more precisely refined into the following issues:

- (1) whether island (coastal) States can unilaterally extend authority over high seas enclaves to prescribe and to apply conservation and allocation measures;
- (2) whether such States can act in concert and by agreement amongst themselves assert authority to prescribe and apply;
- (3) what participation must be allowed to distant-water fishing nations whose vessels fish in these waters.

Consideration of these issues requires reference to both customary and conventional international law of the sea. The following sections address these different regimes.

A. Customary international law of fisheries

There is no basis in customary law and practice for extending coastal fishery management authority of high seas enclaves and enforcing it there without the advance agreement of the flag States affected. Arguments can no doubt be made that this minimal further extension of coastal jurisdiction is in keeping with the spirit of the widespread adoption of national controls over fishing because it will enable the nearby States, mostly developing, to gain benefits from the resources and to make adequate provision for their long-term protection. Current international law, however, still recognizes freedom of fishing beyond extended national jurisdiction and obviously contemplates that management regulations directly enforceable to vessels fishing in such area will be arranged by agreement with flag States or otherwise accepted by responsible vessel owners or operators. ^{36/}

It does not follow from these propositions that coastal States are unable to influence foreign fishing in high seas enclaves, especially in regions where the target species are highly migratory and accessible within and beyond the zones creating the enclaves. The surrounding States in these circumstances might wish to condition access to the fish in their zones on compliance by the fishing State with conditions regarding harvesting of the same species beyond. Enforcement of conditions relating to activity beyond national jurisdiction would take place, if at all, within national jurisdiction rather than beyond. So long as there was no interference with fishing in the high seas enclave, this course of action seems unexceptionable under customary international law.

The basis for the conclusion just mentioned is that under international law a State is permitted to condition access to fisheries within its exclusive jurisdiction, and subject to its sovereign rights to conservation and management, upon completion of acts in areas beyond its jurisdiction. Coastal States commonly exact such conditions for access to their fisheries. For example the United States allocation of the surplus in its fisheries zone can be dependent upon decisions made by fishing States regarding

^{36/} Some agreements have been made regarding enclave areas but they do not authorize coastal enforcement. An exchange of letters dated 4 April 1978 between New Zealand and the USSR provides that Soviet vessels will not fish in two high seas areas enclosed by the New Zealand zone during the period their agreement on fisheries of the same date is in force. In an exchange of letters dated September 1, 1978 between Japan and New Zealand, Japan agreed to "take measures to ensure that fishing vessels of Japan not licensed under Article III of the Agreement (of the same date) will not fish in the abovementioned areas (of high seas enclosed by the New Zealand Zone) and that vessels licensed to fish within the New Zealand Zone will, while operating in the abovementioned areas, respect the conservation and management measures applicable within the New Zealand Zone." It is not wholly clear what this commitment means because it is dependent on the New Zealand measures; however it does obligate Japan to enforce these measures in the enclaves.

Article VI of the 16 March 1978 agreement between New Zealand and Korea differs slightly from the Japanese arrangement. Korea agreed that only vessels licensed under the agreement may fish in the enclaves and that such vessels will comply with New Zealand laws for conservation and management in the latter's zone "as if such laws and licensing conditions were applicable" in the enclaves. The Korean approach does not obligate Korea to ensure compliance. Neither the Korea or Japanese Agreements necessarily limit fishing in the enclaves unless the economic zone measures themselves have quotas or catch restrictions that apply to the enclaves. The Korean agreement perhaps could be construed to place limits on catches in the enclave but the Japanese provision is more difficult to interpret in this way.

None of these approaches explicitly provides for New Zealand enforcement in the enclaves. They are significant nonetheless in suggesting that DWFN are willing to negotiate solutions to the enclave question. What trade-offs were involved in the New Zealand agreements is not known and they may in any event differ elsewhere.

tariffs upon imports. ^{37/} The draft LOS treaty in article 61 clearly envisages terms and conditions on foreign access to fisheries that require action outside coastal State jurisdiction. Such conditions are compatible with customary international law.

It is assumed here that highly migratory species of all types -- tuna, billfish, marlin, whatever -- are subject to coastal State jurisdiction in the economic or fisheries zone in the same fashion as other fish found there. The recent, nearly universal extensions of national jurisdiction are in almost all instances drafted to include all fisheries in the fisheries zone, with only a handful of States excepting all or some highly migratory species. Although the United States, which has about 50 percent of the world market for canned tuna, opposes coastal jurisdiction and has domestic law provisions designed to discourage claims to include tuna within extended national jurisdiction, this opposition has not been effective in changing the position of other States although it is frustrating management efforts in both the eastern and western Pacific. It is clear, despite U.S. opposition, that the vast majority of coastal States believe that it is compatible with customary law to extend national jurisdiction over tuna and other highly migratory species.

^{37/} The Magnuson Fishery Conservation and Management Act was amended in 1980 to provide that allocation determinations must be made on the basis of the following:

- (a) whether, and to what extent, such nations impose tariff barriers or nontariff barriers on the importation, or otherwise restrict the market access, of United States fish or fishery products;
- (b) whether, and to what extent, such nations are cooperating with the United States in the advancement of existing and new opportunities for fisheries trade, particularly through the purchase of fish or fishery products from United States processors or from United States fishermen;
- (c) whether, and to what extent, such nations and the fishing fleets of such nations have cooperated with the United States in the enforcement of United States fishing regulations;
- (d) whether, and to what extent, such nations require the fish harvested from the fishery conservation zone for their domestic consumption;
- (e) whether, and to what extent, such nations otherwise contribute to, or foster the growth of, a sound and economic United States fishing industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;
- (f) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;
- (g) whether, and to what extent, such nations are cooperating with the United States in, and making substantial contributions to fishery research and the identification of fishery resources; and
- (h) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

In light of this brief discussion of applicable customary international law, the following conclusions are warranted.

(1) Coastal States cannot extend full authority over enclosed high seas areas and distant-water fishing nations (DWFN) are entitled to fish there in the exercise of their freedom of fishing on the high seas. Adjacent coastal States are without authority directly to prescribe and to apply policy for DWFN activities in the absence of agreement.

(2) Coastal States are competent to condition access to fisheries subject to coastal jurisdiction within 200 miles upon observance by DWFN of specified conditions or constraints on fishing on the high seas areas beyond. However, such conditions cannot be prescribed directly or enforced beyond national jurisdiction.

(3) Regional agencies established by coastal nations for managing fisheries within and beyond fishery zones have no greater authority than the States creating them and could regulate high seas fishing only as described in (2) above.

(4) Coastal States have no right to a preference or priority on catch, or on proceeds of catch, or on any other form of benefit deriving from fishing in a high seas enclave. However, a coastal State or States might exact a share of the benefits from fish caught in the high seas area as a condition for access to take fish in an area subject to its jurisdiction.

Recent commentators have suggested that the 1974 decision of the ICJ in U.K. v. Iceland is authority for the proposition that the coastal State is entitled to a preference regarding benefits of fisheries outside but adjacent to the coastal State's zone of exclusive jurisdiction.^{38/} This seems to be a misreading of that case and an unsupported extrapolation of the decision. The Court in U.K. v. Iceland sought to determine requirements of customary international law in light of recent international conferences and apparent tendencies and trends in expansion of national jurisdiction. The preferential rights it would recognize were in areas adjacent to a 50 mile exclusive fishing zone but which would now fall within a 200 mile zone. The subsequent nearly universal extension of exclusive fishing jurisdiction to 200 n.miles goes well beyond the decision in U.K. v. Iceland in granting exclusive and sovereign rights to coastal States not just preferential rights. The Court's decision is not authority for asserting that coastal States are now entitled to preferential rights even beyond 200 n.miles.

(5) Insofar as the fisheries of a region, including those in the combined zones of the adjacent States and in the enclave, are to be managed by international agreement, it is necessary that the distant-water States be a party to the agreement if the objective is to impose requirements on its flag vessels in the enclave area. If agreements are negotiated with private associations representing the vessels fishing in the area the flag State itself need not be a party. A private agreement, however, necessarily affects the kind of provisions that can be made for dealing with all vessels of a particular State that may fish or transit an area. A flag State can take responsibility and control for all flag vessels while a private association is in no position to exert such control or assume such responsibility.

B. High Seas Enclaves and the Draft Convention on the Law of the Sea

The question of coastal and flag State authority over highly migratory species under the draft LOS Convention is complicated but the following propositions are supportable.

First, there is no doubt that a coastal State has full authority to dispose of HMS found within its economic zone. Article 56 confers sovereign rights on the coastal State over all living resources and does not distinguish among them. Article 64 expressly declares that this article and all others in Part V are applicable to highly migratory species.

Second, the coastal State is obliged to "cooperate" with other States fishing for HMS in the region, including fishing within the EEZ and beyond. The aims of this cooperation in the zone area are "to ensure conservation" and "to promote optimum utilization". However, cooperation for such ends is

^{38/} See Van Dyke and Heftel (1981)

in the context of full coastal authority and discretion to establish a total allowable catch in its zone, to determine its capacity to harvest the TAC, to establish conservation and management measures in its zone, and to determine who may harvest how much fish in its zone.

Third, this cooperation to ensure conservation and to promote optimum utilization relates to species both within and beyond the EEZ.

Fourth, the substance of the obligation is to "cooperate" which can be discharged by negotiating with the coastal State to establish management measures. It is not necessarily required that the States concerned reach agreement on conservation or on optimum utilization. Failure to negotiate in good faith would amount to failure to cooperate and constitute a violation of the treaty obligation. 39/ Failure of good faith negotiations would not be a violation.

Fifth, should coastal States and other States cooperate as best they can but still fail to agree on appropriate measures, it will be for the coastal State to decide upon measures in its zone of jurisdiction. States fishing beyond the zone are entitled to do so once they have genuinely sought to cooperate with coastal States.

Sixth, because the obligation to cooperate relates to species within the EEZ as well as beyond, the coastal State is not wholly free to determine measures applicable in its own zone. The coastal State cannot make any final decisions on conservation and utilization in its zone until its good faith efforts to cooperate do not bear fruit. Such efforts need not be pressed indefinitely but must be pursued for a reasonable time in relation to the requirements of effective management within its zone where it has ultimate authority to manage.

Seventh, flag States fishing in the region are also not free to fish as they please in the region or to adopt their own conservation and utilization measures until they have discharged the duty to cooperate with coastal States on these matters. Article 116 specifically qualifies the flag State's freedom to fish on the high seas by making it subject to the rights, duties, and interests of coastal States provided for in Article 64. After failure of cooperation, flag States may decide upon the measures they wish to pursue in the region beyond 200 n.miles, subject to the obligations of Articles 117 and 119 of the Draft Convention. The most important of these obligations for present purposes is the obligation in 119(2) to contribute and to exchange "available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks" through a competent international organization.

Eighth, the coastal State and other States fishing in the region are required to cooperate but the mechanism for doing so is for them to decide. According to Article 64 of the Draft Convention the required cooperation may be through direct interaction "or through appropriate international organizations". Article 64 does not require the States concerned to cooperate through an international organization. If the States concerned do not cooperate directly and no appropriate international organization exists for the region, they are directed by Article 64 to create an appropriate organization and to participate in its work.

It is not clear what right there is to fish on the high seas if the DWFN does not "recognize" coastal State rights, etc., but the right appears to be sufficiently qualified that some coastal State measures might be applied without violating the treaty or international law. A dispute over the meaning of Article 116 would be subject to compulsory dispute settlement under Part XV of the treaty.

39/ The obligation to cooperate pertains to an area in which coastal and flag States both have rights and interests under the draft treaty. An obligation to negotiate in such a situation seems to flow, as the ICJ declared in *U.K. v. Iceland*, from "the very nature of the respective rights of the parties." 1974 ICJ Rep. 32. The respective rights of coastal and flag States are not necessarily the same or even similar to those at stake in *U.K. v. Iceland*. See also Brown (1977) at 340-43.

In light of the above considerations derived from the provisions of the Draft LOS Convention, the following conclusions are drawn regarding the coastal State's and flag State's authority to regulate fishing for HMS in enclaves.

(1) Coastal States are not entitled unilaterally to extend their authority directly over high seas fishing in an enclave and non-coastal States are entitled to fish there, subject to both recognition of coastal State rights, duties, and interests as provided in Article 64 of the draft Convention and to the obligations of Articles 116-119.

(2) Adjacent coastal States are entitled to demand that distant-water fishing nations negotiate with such States through mechanisms of their mutual choice "to ensure conservation" and "to promote optimum utilization" of HMS in the enclaves and in the EEZ. Such a good faith effort to cooperate is a reasonable condition precedent to high seas fishing for tuna or other HMS, in light of Article 116 of the Draft Convention which provides that the right to fish on the high seas is subject, inter alia, to the rights of the coastal State under Article 64. ^{40/} Such cooperation through negotiation requires, in turn, that coastal nations negotiate in good faith regarding conservation and optimum utilization of the HMS found within their economic zones.

(3) Failure of negotiations about the HMS of the region, both within and beyond the EEZ, would leave the coastal State free to adopt its own measures, otherwise in compliance with the Convention, for HMS within the zone. Coastal determination of the TAC, domestic harvesting capacity, allocation of surplus, and the content of its regulations, cannot be challenged under the compulsory dispute settlement provisions of the Convention. On the other hand, actions (or lack thereof) by distant-water fishing States in enclave areas that are considered inconsistent with obligations under the Draft Convention can be challenged; in the event of a dispute over the interpretation or application of the Convention such dispute may be submitted to the compulsory procedures provided in Part XVI.

(4) Article 64 of the draft treaty calls for management of HMS in the region (within and beyond the EEZ) either by direct cooperation between coastal and distant-water States or through international organizations or through both means. Article 64 does not require creation of international organizations to regulate fishing for HMS in a region. The States involved, coastal and distant water, can decide either to cooperate directly or to create one or more international agencies or a combination of these. Whichever route is chosen, the distant-water fishing nations must necessarily be involved in some fashion or obviously there could be no cooperation. However, it does not follow that if the States seek to cooperate through an international organization they are obliged to adopt any specific type. The functions of the organizations mentioned in Article 64 are not described either generally or in detail. ^{41/} Accordingly, it appears that so far as the obligations of Article 64 are concerned the States involved are free to specify whatever structure they may want for an organization and they could arrange for the functions of the agency to be performed in a number of different ways.

^{40/} For a similar conclusion see Van Dyke and Heftel (1981) at 43.

^{41/} Although none of the several negotiating texts produced in the LOS negotiations ever provided for details of the international organizations mentioned, the Evensen Group negotiations did consider some. The 6th Revision of the Evensen Group articles on the economic zone (dated 16 April 1975) called for an international organization to formulate standards and recommendations regarding conservation and optimum utilization throughout the region. The coastal State would be obliged to ensure that its laws and regulations were in conformity with the standards but only to take into account the recommendations. The latter would deal with the allowable catch, equitable allocation permits, fees and penalties, while standards would apparently concern conservation. This modest grant of authority to an international organization did not survive negotiations for inclusion in the Informal Single Negotiating Text.

For example, it does not follow from Article 64 that the agency must be given authority to make decisions on either conservation or allocation of benefits. Existing agencies dealing with HMS have no final decision-making authority on such matters; they act by making recommendations to member States on these points. With respect to other matters too, the existing agencies operate differently. Only one (IATTC) has had a research capability. None has been given any enforcement capability. Accordingly, Article 64 type organizations might differ in their objective, structure, and decision-making functions. This lack of provision for organizational structure, objectives, functions, and so forth, makes it evident that States are not required to choose between direct cooperation and an international agency. The States concerned may wish to create an agency with a certain structure, membership, and function and withhold from it any final decision-making authority, leaving ultimate choices to be made by the States themselves meeting separately. While cooperation solely through the international organization route certainly implies that distant-water nations must participate, the arrangements for such participation might be designed in a number of different ways. In the end the means and methods of cooperation will depend on the cooperating parties themselves and result from negotiations in which the bargaining strengths of the parties will be determinative. The provisions of Article 64 and related articles place little or no constraint on this process.

C. Concluding remarks

The issues of coastal authority over fishing in high seas enclaves do not admit of simple answers, as the preceding discussion suggests. With the qualifications indicated, however, it appears that, under the draft LOS treaty, in some circumstances a coastal State could be entitled to demand that a DWFN abstain from fishing in an enclave unless its fishing vessels observed certain requirements concerning conservation and management. The major precondition to such a demand would be the failure of the DWFN to cooperate regarding conservation and optimum utilization.

The requirements of Article 64 of the draft LOS Convention seem sufficiently flexible that the States of a region could establish an international agency in which they alone are members to cooperate directly with DWFN regarding enclaves fishing. Such an entity could not initiate regulation of DWFN fishing activities in the enclave but could, as representative of all States of a region, take the position that a non-cooperating DWFN had no right of access to the fisheries in the enclave unless it conformed to specific regulations. Differences over the relative authority of the coastal State, the international institution they design, and DWFN would be subject to compulsory dispute arrangements in the draft LOS treaty.

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